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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ADVANCED SCIENTIFIC APPLICATIONS, INC., Plaintiff and Appellant, v. PACIFIC BELL TELEPHONE COMPANY et al., Defendants and Respondents.	G039287 (Super. Ct. No. 01CC00337) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Ronald L. Bauer, Judge. Affirmed.

Shahram Manighalam, in pro. per.; and Law Offices of Tabone and Derek L. Tabone for Plaintiff and Appellant. [*Retained.*]

Pillsbury Winthrop Shaw Pittman, Douglas R. Tribble, Connie J. Wolfe and Kevin M. Fong for Defendants and Respondents.

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Advanced Scientific Applications, Inc. (ASA), an Internet service provider, filed a complaint for unlawful tying under the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.), predatory pricing under the Unfair Practices Act (Bus. & Prof. Code, § 17000 et seq.), and unfair competition under the unfair competition law (Bus. & Prof. Code, § 17200 et seq.) against Pacific Bell Telephone Company and SBC Advanced Solutions, Inc. (collectively, Pacific Bell).[1] A demurrer was sustained without leave to amend as to the predatory pricing cause of action. Summary judgment was later granted with respect to the remaining causes of action. ASA assigned all of its interests with respect to the litigation to its chief executive officer, president, and sole shareholder, Shahram Manighalam (Manighalam). Manighalam appeals.

With respect to procedural matters, we conclude that Manighalam, as assignee, has standing to maintain the appeal as to ASA's claims other than those for statutory penalties, which are not assignable. ASA's informal request to be substituted into the litigation in place of Manighalam is denied, inasmuch as ASA has no remaining rights in the litigation left to pursue.

As for the merits, on the sparse record before us, we conclude the court did not err in sustaining the demurrer without leave to amend or in granting summary judgment. With respect to the demurrer, Manighalam has failed to provide an adequate record to show that the trial court erred in concluding that applicable tariffs barred the section 17043 cause of action for predatory pricing. In opposing the motion for summary judgment, ASA failed to raise a triable issue of material fact as to whether the alleged tying item was a product that would support a cause of action under section 16727 or a service that would not. Also, its section 17200 et seq. unfair competition cause of action

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[1] All subsequent statutory references are to the Business and Professions Code, except as otherwise expressly stated herein.

failed as a matter of law because the only relief ASA sought was unavailable under that body of law. We affirm.

I

FACTS

A. NATURE OF DISPUTE:

For the purposes of this introduction, we provide a description of the nature of the underlying situation from the perspective of Manighalam, as taken from his opening brief on appeal. This brief provides a more cogent and concise explanation of the underlying technicalities, from the viewpoint of the plaintiff/appellant, than do ASA's filings in the trial court. The statements contained in this introduction are not to be construed as factual findings.

ASA is an Internet service provider (ISP). Pacific Bell owns the Internet access infrastructure in ASA's service area. In order to provide Internet access to its digital subscriber line (DSL) customers, or end users, ASA must contract with Pacific Bell.

ASA needed to use a physical line to access to Pacific Bell's infrastructure. Either a "T1" line or a "T3" line was available for this purpose. A "T1" line handles a smaller volume of data than a "T3" line and is less expensive than a "T3" line. ASA chose to contract for the use of the less expensive "T1" line.

In order to connect either a "T1" or a "T3" line to the equipment of the end user who purchased DSL Internet access from an ISP, an ATM circuit was required. Pacific Bell limited the number of ATM circuits it would provide with respect to a "T1" line to 32, thus limiting to 32 the number of end users with whom an ISP using a "T1" line could contract. Pacific Bell made 255 ATM circuits available with respect to "T3" lines. Consequently, an ISP that desired to sell DSL Internet access to more than 32 end users was required to contract for the use of a “T3” line, even if the “T1” line had a large enough capacity to handle the volume of data from more than 32 end users.

Pacific Bell also offered certain marketing programs to ISP’s that contracted for the use of “T3” lines. However, it did not make those same programs available to ISP’s using “T1” lines.

In addition, Pacific Bell offered DSL Internet access to individual consumers who chose to contract with it directly, rather than going through ISP’s. Pacific Bell provided modems to its direct customers.

ASA filed suit against Pacific Bell, alleging unlawful tying of ATM circuits, unlawful tying of advertizing, predatory pricing, and unfair competition.

B. PROCEDURAL HISTORY:

This is the second appeal arising out of the underlying litigation. In the prior appeal (*Advanced Scientific Applications, Inc. v. Pacific Bell Telephone Company* (Apr. 15, 2004, G030660) [nonpub. opn.]), we reversed a judgment of dismissal following the sustaining of a demurrer without leave to amend. ASA had repeatedly failed to appear in court, and indeed the court had sustained the demurrer when ASA had failed to attend a hearing on the demurrer. Manighalam, as the chief executive officer of ASA, had attended several hearings without an attorney, each time explaining that he had been unable either to contact ASA’s original attorney or to hire a new one.

In our opinion, the majority stated: “Clearly, at each hearing, the court underscored the fact that Advanced Scientific could not proceed without an attorney. [Citations.] Having received explicit instruction to hire an attorney, Advanced Scientific nonetheless failed to do so.” It further stated: “In our view, it was a clear abuse of discretion not to give substantial time for Advanced Scientific to obtain competent counsel, before the court ruled on the demurrer.”

On remand, the court sustained, without leave to amend, a demurrer to ASA's third cause of action, leaving the first, second and fourth causes of action in tact. The court later granted Pacific Bell's motion for summary judgment and judgment was entered accordingly.

A notice of appeal was filed. It stated that notice was given "that Plaintiff, Advanced Scientific Applications, Inc. appeals" from the judgment. The quoted language was repeated thrice more, with respect to: (1) an order denying an application for a stay and denying a request to vacate the summary judgment; (2) an order granting the motion of ASA's counsel to be relieved; and (3) the order sustaining the demurrer as to the third cause of action.[2] The notice of appeal was signed by Manighalam. Below the signature line appeared the following words: "Shahram Manighalam[,] Assignee of All Advanced Scientific Applications, Inc.'s claims against All Defendants, Pacific Bell and SBC Advanced Solutions, Inc."

The civil case information statement identified the party without attorney as "Advanced Scientific Applications, Inc. ('ASA') AND Shahram Manighalam the ASSIGNEE of all of ASA's Claims against all Defendants." The document was signed by Manighalam.

We issued an order inviting the parties to file supplemental letter briefs addressing whether Manighalam was an aggrieved party with standing to maintain the appeal, whether the rights assigned to him were assignable choses in action, and, if not, whether dismissal was required for lack of jurisdiction or whether the problem could be cured by substituting a licensed attorney. Pacific Bell Telephone Company et al. and

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2 In his opening brief, Manighalam has not addressed either the order denying an application for a stay and a request to vacate the summary judgment or the order granting the motion of ASA's counsel to be relieved. Consequently, he has abandoned his appeal with respect to those two orders. (*Tanner v. Tanner* (1997) 57 Cal.App.4th 419, 422, fn. 2.)

Manighalam each filed a supplemental letter brief and a responsive supplemental letter brief. We then issued an order stating that the determination of the issues of standing and jurisdiction would be made in conjunction with the decision on appeal.

Thereafter, an appellant's opening brief, a respondent's brief, and an appellant's reply brief were filed. The appellant's opening brief states in the body thereof: "Now that ASA has counsel, appellant requests that ASA be substituted in for and in the place of Shahram Manighalam. The request is made by this reference, as Appellant reads this court's prior order to require handling the issue as to whether Appellant is an 'aggrieved party' as to maintain standing as part of the appeal. Should a formal motion be necessary, Appellant is prepared to file one. In anticipation of this request being granted this brief treats ASA as the Appellant."

We subsequently issued another order stating: "Shahram Manighalam and Advanced Scientific Applications, Inc. are directed to provide this court with copies of any and all assignments relating to the plaintiff's and/or appellant's claims or causes of action that are the subject matter of the underlying litigation in this matter and/or this appeal." We received a copy of a document providing: "Advanced Scientific Applications' Inc. . . . ('ASA') hereby ASSIGNS and TRANSFERS, without any limitation, all of its RIGHTS and CLAIMS for all causes of actions in the California Superior Court County of Orange, Case Number: 01CC00337, titled as: Advanced Scientific Applications, Inc. . . . [Plaintiff] vs. Pacific Bell Telephone Company . . . , SBC Advanced Solutions, Inc. . . . [Defendants], TO ASA's CEO, President and 100% Share holder, Shahram Manighalam as an INDIVIDUAL and PERSON." The document was dated May 30, 2007, the day after the order granting summary judgment was filed, and was signed by Manighalam as "President, CEO and Owner of 100% of all of all of the Shares of Advanced Scientific Applications, Inc."

II

DISCUSSION

A. STANDING:

(1) As Assignee –

Manighalam says that, as the assignee of ASA's claims, he has standing to appeal.[3] Pacific Bell disagrees. It contends that the causes of action ASA purported to assign are causes of action for statutory penalties, that are not assignable. It also asserts that if any of the causes of action might give rise to remedies other than statutory penalties, the entire assignment should fail in any event because of severability issues.

In assessing the arguments of the parties, we first note the remedies available with respect to the various causes of action. The first two causes of action as described in the third amended complaint are for unlawful tying in violation of section 16727. Section 16750 allows for treble damages and injunctive relief in connection with an injury under section 16727. The third cause of action is for predatory pricing in violation of section 17043. Two separate statutes address damages in connection with section 17043. Section 17070 provides for actual damages and injunctive relief and section 17082 provides for treble damages. (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 277 (*G.H.I.I.*).) The fourth cause of action is for unfair competition, in violation of section 17200 et seq. Where such violations are concerned, section 17203 allows injunctive and restitutionary relief. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 179 (*Cel-Tech*).)

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3 Manighalam also asserts several other bases for standing, claiming he is aggrieved as sole shareholder, and is a party of record as one who filed a motion to vacate and as a cross-defendant. However, inasmuch as he professes to pursue the claims as the assignee of ASA, we need not address the significance of these other matters.

It is immediately apparent that, contrary to Pacific Bell's assertion, not all of the causes of action ASA purported to assign give rise to statutory penalties. Where the damages remedies are concerned, we observe that statutory remedies include both some for treble damages and at least one for actual damages.

"[T]he settled rule in California is that statutes which provide for recovery of damages additional to actual losses incurred, such as double or treble damages, are considered penal in nature [citations] . . . ." (*G.H.I.I., supra,* 147 Cal.App.3d at p. 277.) Therefore, the treble damages statutes in question here are penal in nature.

Pacific Bell argues that the penalties available under those statutes are not assignable, citing *Peterson v. Ball* (1931) 211 Cal. 461, 462-463, 468-470 (*Peterson*). Manighalam, on the other hand, insists that they are assignable, citing *Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252 (*Essex*). We agree with Pacific Bell, for reasons we shall show.

In *Essex, supra,* 38 Cal.4th 1252, the court addressed "whether assignment of a tort action against an insurer for wrongfully withholding policy benefits includes the right to recover *Brandt* fees."[4] (*Id.* at p. 1257.) In addressing this issue, the court stated: "California, as set forth both in case law and by statute, maintains a policy encouraging the free transferability of all types of property. [Citations.]" (*Id.* at p. 1259, fn. omitted.) It also stated: "'As a general proposition it can be said "'that the only causes or rights of action which are not transferable or assignable in any sense are those which are founded upon wrongs of a purely personal nature, such as slander, assault and battery, negligent personal injuries, criminal conversation, seduction, breach of marriage promise, malicious prosecution, and others of like nature. All other demands, claims and rights of action whatever are generally held to be transferable.'"' [Citations.]" (*Id.* at p. 1260.)

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4 See *Brandt v. Superior Court* (1985) 37 Cal.3d 813.

Manighalam focuses on this language, stating that statutory penalties are not on the list of items the court identified as being nonassignable. Although that is true, the *Essex* court was expressing a general rule and clearly did not intend the quoted language to constitute a comprehensive or exhaustive list. Indeed, Manighalam overlooks the subsequent portion of the opinion wherein the *Essex* court noted that punitive damage claims are not assignable. (*Essex, supra,* 38 Cal.4th at pp. 1261-1262.) This is consistent with the court's prior holding in *Peterson, supra,* 211 Cal. 461, to the effect that statutory penalties, being punitive in nature, are not assignable. (*Id.* at pp. 462-463, 468-470.) Consequently, we conclude that the treble damages claims asserted in the underlying litigation are not assignable.

This is not the end of our inquiry, however. Our conclusion prompts the question raised by Pacific Bell, that is, whether ASA's assignment is void in its entirety because some of ASA's claims give rise to nonassignable statutory penalties. Pacific Bell argues, albeit without much detail, that to permit the appeal to proceed only on claims not involving statutory penalties would be to cause substantial issues concerning severability and partial assignments. It asserts that the bulk of ASA's assignment is prohibited and argues that the assignment therefore is unenforceable in its entirety, unless Manighalam can separate the consideration given for the assignable portion and the consideration given for the nonassignable portion, so that only the assignable portion could be enforced and the appeal would be limited to that portion.

Pacific Bell perhaps makes the issue more complicated than it needs to be. In this case, we need not delve into issues of consideration. Civil Code section 1599 provides: "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." "It is settled that where a contract has both void and valid provisions, a court may sever the void provision and enforce the remainder of the contract. [Citations.] California cases take a very liberal view of severability, enforcing valid parts of an apparently indivisible contract where the interests of justice or the policy of the law would be furthered. [Citations.]" (*Adair v. Stockton Unified School Dist.* (2008) 162 Cal.App.4th 1436, 1450.) Civil Code section 1599 does not mandate severance. (*Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 992.) Rather, the question of severance "in an individual case must be informed by equitable considerations. [Citation.] Civil Code section 1599 grants courts the power, not the duty, to sever contracts in order to avoid an inequitable windfall or preserve a contractual relationship where doing so would not condone illegality. [Citation.]" (*Ibid.*)

The issue of severability of claims in the context of certain of the Business and Professions Code provisions implicated in this case was addressed in *G.H.I.I., supra*, 147 Cal.App.3d 256. In that case, the court, in its analysis of a statute of limitations issue, stated that a claim for actual damages under section 17070 was "patently severable" from a claim for treble damages pursuant to section 17082. (*Id.* at p. 279.) We see no reason to disagree. The *Essex* court acknowledged that there could be times when a "'hybrid cause of action'" was at issue, in other words, when the cause of action was assignable but an aspect of the damage claim was not. (*Essex, supra,* 38 Cal.4th at pp. 1261, 1263.) As the *Essex* court stated with respect to the issues in question there: "Although some damages potentially recoverable in [the] action, including . . . punitive damages, are not assignable [citation], the cause of action itself remains freely assignable as to all other damages [citation]." (*Essex, supra,* 38 Cal.4th at p. 1263.) This rule fits the case before us as well. Here, the claims are assignable, but the statutory penalties are not.[5]

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[5] Given our ultimate conclusions in this case, we need not decide whether the treble damages awards made available by statute should be divisible into assignable and nonassignable portions — that is, whether one-third of the statutory damages should be

To fail to sever the void portions of the assignment, involving statutory penalties, and to hold the entire assignment void, would not be in the interests of justice. Rather, to preclude Manighalam from pursuing any claims at all against Pacific Bell would result in a potential windfall to Pacific Bell, if any of the claims in question had merit. Manighalam has standing to pursue the appeal in his capacity as assignee, but only as to the assignable portions of the claims.

As an aside, we note that Pacific Bell can have no concern over the splitting of causes of action. To the extent that the nonassignable penalty claims could be construed to remain with ASA, it matters not. Since ASA failed to file a notice of appeal from the judgment, the judgment is final as to ASA. Any unassigned claims that ASA may have had with respect to the judgment are now time barred.

As for ASA's informal request to be substituted into the litigation as appellant, the request is denied. ASA has no remaining interest in the litigation to pursue.

(2) Lack of Substitution –

Pacific Bell, citing Code of Civil Procedure section 368.5, claims that there is another reason why Manighalam cannot maintain the appeal. It says that he has no standing because he did not make a formal request to be substituted into the action in his own name.

Code of Civil Procedure section 368.5 provides as follows: "An action or proceeding does not abate by the transfer of an interest in the action or proceeding or by any other transfer of an interest. The action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." It is true that Manighalam did not request to be substituted into the action in the place of ASA. However, he was not required to, as

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assignable as the compensatory portion and the remaining two-thirds of the statutory damages should be nonassignable as the penal portion.

section 368.5 makes clear. (*Casey v. Overhead Door Corp.* (1999) 74 Cal.App.4th 112, 121, disapproved on another ground in *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 481, fn. 1.) He may continue to pursue the action in the name of ASA, as the original party. To hold otherwise would be to deprive Manighalam of a determination of his appeal. "The law abhors the forfeiture of the right to a determination of a cause of action on the merits. [Citation.] Under these facts, the court's refusal to allow [Manighalam] to proceed on the assigned [claims would act] as such a forfeiture." (*Id.* at p. 122.)

B. DEMURRER:

(1) Introduction –

Pacific Bell filed a demurrer to ASA's second amended complaint. The court sustained the demurrer with leave to amend.

ASA then filed a third amended complaint, to which Pacific Bell filed another demurrer. In that demurrer, it challenged each of ASA's four causes of action. The court overruled the demurrer with respect to the first, second and fourth causes of action. It sustained, without leave to amend, the demurrer as to the third cause of action. Manighalam contends the court erred with respect to its ruling on the third cause of action.

At the outset, we observe that Manighalam has not provided this court with as complete a record for review of this matter as would be desirable. Although the caption of Pacific Bell's notice of hearing, demurrer and memorandum of points and authorities would indicate that Pacific Bell filed a memorandum of points and authorities in support of its demurrer to the third amended complaint, the appellant's appendix contains no copy of any such memorandum of points and authorities. Furthermore, the appellant's appendix contains only the face page of ASA's memorandum of points and authorities in opposition to the demurrer and only the face page of Pacific Bell's reply memorandum.

In addition, the minute order on the demurrer to the second amended complaint discloses that Pacific Bell "properly [sought] judicial notice of the FCC Tariffs." This shows that Pacific Bell filed a request for judicial notice of applicable Federal Communications Commission (FCC) tariffs, germane to the determination of issues on demurrer, and that the request was granted. However, our record on appeal contains no copies of the request for judicial notice or its attachments. Therefore, we cannot review those tariffs in connection with the issues on appeal.

Finally, as we shall show, Pacific Bell raises an issue that requires a comparison of the allegations of the second amended complaint to the allegations of the third amended complaint. However, the record does not contain a copy of the second amended complaint, so we cannot make the comparison.

We will review the ruling on the third cause of action as contained in the third amended complaint based on the limited record before us. However, as will become evident, the defects in the record impact the outcome of the appeal.

(2) Standard of Review –

"The standard of review on an appeal from judgment of dismissal following sustaining of a general demurrer is guided by long settled rules. We treat the demurrer as admitting all material facts properly pleaded, as well as those which reasonably arise by implication, but not contentions, deductions or conclusions of fact or law. [Citations.] 'Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.' [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action on any theory. [Citations.] Moreover, '"the allegations of the complaint must be liberally construed with a view to attaining substantial justice among the parties."' [Citations.] A demurrer challenges only the legal sufficiency of the complaint, not the truth of its factual allegations or the plaintiff's ability to prove those allegations. [Citation.]" (*Yue v. City of Auburn* (1992) 3 Cal.App.4th 751, 756-757.)

(3) Predatory Pricing –

(a) Applicable statutes

Section 17043 provides: "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition."

The application of this statute is limited by section 17024. Section 17024 provides in pertinent part: "Nothing in this chapter [Bus. & Prof. Code, div. 7, pt. 2, ch. 4, § 17000 et seq.] applies: [¶] (1) To any service, article or product for which rates are established under the jurisdiction of the Public Utilities Commission of this State and sold or furnished by any public utility corporation, or installation and repair services rendered in connection with any services, articles or products. [¶] (2) To any service, article or product sold or furnished by a publicly owned public utility and upon which the rates would have been established under the jurisdiction of the Public Utilities Commission of this State if such service, article or product had been sold or furnished by a public utility corporation, or installation and repair services rendered in connection with any services, articles or products."

(b) Analysis

In its third cause of action, ASA asserted that Pacific Bell engaged in predatory pricing, in violation of section 17043. ASA alleged: "Based on ASA's best estimate of defendants' costs, in dollars, of providing ISP services and DSL modems, defendants, and each of them, have provided their customers with ISP services and have given away DSL modems at a cost below that which it itself incurs to provide them.

[¶] . . . ASA further alleges that there is a dangerous probability that defendants' conduct, as alleged, will enable them to obtain a monopoly over the DSL market in ASA's market area." ASA alleged more specifically that Pacific Bell gave away for free modems worth approximately $80-$90 apiece and that Pacific Bell charged residential customers approximately $30 per month for providing DSL service, when the actual cost of providing such service was approximately $73 per month.

In its demurrer, Pacific Bell asserted that the third cause of action failed because section 17024 made section 17043 inapplicable to public utility companies selling services pursuant to tariffs. Pacific Bell also said that the cause of action was uncertain, was barred by the ruling in *Verizon Commun. v. Law Off. of Curtis Trinko* (2004) 540 U.S. 398, was barred by the filed rate doctrine, and was insufficient because ASA failed to allege facts to demonstrate that it was injured by restraints on competition.

In the minute order on the demurrer, the trial court stated that *Verizon Commun. v. Law Off. of Curtis Trinko, supra,* 540 U.S. 398 did not bar any of the causes of action. However, it held that the third cause of action failed because Pacific Bell's "services were sold under tariffs filed with the [California Public Utilities Commission]" (CPUC) and that such services were not subject to a section 17043 claim.

On appeal, Manighalam acknowledges that section 17024 barred the portion of his cause of action having to do with the price Pacific Bell charged for its DSL service, because the price was set by tariff. However, he claims that the portion of the cause of action having to do with the allegation that Pacific Bell gave modems away for free was not barred by section 17024. Manighalam claims that he is not aware of any tariff establishing the prices Pacific Bell is permitted to charge for modems.

However, as we stated at the outset, our record on appeal does not contain copies of the applicable tariffs, of which the trial court apparently took judicial notice. Therefore, we cannot review those tariffs to see whether they address only the pricing for the residential DSL service, or whether they also address the pricing for modems. We could, therefore, stop at this point in the analysis and affirm the decision of the trial court with respect to the demurrer on the ground that ASA has not provided an adequate record for review. On appeal, we presume that the order of the trial court is correct. (*Virtanen v. O'Connell* (2006) 140 Cal.App.4th 688, 709.) It is the appellant's burden to show reversible error, by an adequate record. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1433.)

However, we observe that, while not explicitly conceding the point, Pacific Bell does not directly challenge the assertion that the applicable tariffs did not set a price for modem sales. Rather, Pacific Bell argues, without citation to legal authority, that ASA's pleading was defective because it asserted a violation of section 17043 based on the *combined* conduct of providing ISP services and DSL modems below cost.

In addition, Pacific Bell maintains that ASA failed to avail itself of a prior opportunity to amend its complaint to cure this defect. As noted above, the court sustained Pacific Bell's demurrer to ASA's second amended complaint, with leave to amend. With respect to the third cause of action, the court stated: "The 3rd cause of action fails as [Pacific Bell's] services were sold under tariffs filed with the CPUC. Such services are not subject to a B&P § 17043 claim."

Pacific Bell says that ASA did not amend its complaint as to the third cause of action, but rather, that ASA, in its third amended complaint, repeated the allegations of the second amended complaint verbatim, at least as to the third cause of action. Pacific Bell contends that, under the circumstances, case law compels this court to affirm the ruling. "'When a plaintiff elects not to amend the complaint, it is presumed that the complaint states as strong a case as is possible [citation]; and the judgment of dismissal must be affirmed if the unamended complaint is objectionable on any ground raised by the demurrer. [Citations.]' [Citation.]" (*Soliz v. Williams* (1999) 74 Cal.App.4th 577, 585.)

In considering Pacific Bell's point, we are again hampered by the paucity of the record before us. It does not contain copies of either the second amended complaint or the demurrer thereto. Therefore, the record affords us no basis for affirming the ruling on the particular ground offered by Pacific Bell.

What we know is that, in the third amended complaint, ASA alleged that Pacific Bell gave modems away for free and sold its residential DSL service below its cost. The trial court held that the section 17043 claim was barred because Pacific Bell's services were sold under tariffs. Manighalam asserts that the court erred because the tariffs did not address the issue of the sales price of modems. While Pacific Bell does not attack this assertion, we conclude that Manighalam has failed to provide an adequate record to prove his point. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund, supra,* 65 Cal.App.4th at p. 1433.)

C. SUMMARY JUDGMENT:

(1) Introductory Comment –

Before reaching the merits of the summary judgment issues, we must again note the deficiencies in the record that plague our review. The appellant's appendix contains a copy of the three-page notice of motion and motion for summary judgment. However, it contains only a copy of the face page of Pacific Bell's memorandum of points and authorities in support of its motion. In addition, it contains only the first two pages of ASA's memorandum of points and authorities in opposition to the motion and only the face page of Pacific Bell's reply memorandum. Consequently, we have been deprived of seeing the "guts" of Pacific Bell's motion.

Furthermore, the order granting motion for summary judgment states: "Defendants requested judicial notice of certain tariffs and decisions of the CPUC and FCC in support of their Motion for Summary Judgment. As tariffs and the official acts of administrative agencies are a proper subject for judicial notice, and no objection to such notice was brought, Defendants' Request for Judicial Notice is hereby granted." However, the appellant's appendix, once again, fails to include copies of the request for judicial notice and attachments thereto. Consequently, we are deprived of the opportunity to review the tariffs and certain other materials that Pacific Bell presented in support of its motion.

What ASA has provided is Pacific Bell's separate statement of undisputed facts in support of its motion and ASA's response thereto. It would appear that ASA viewed these items as the only ones of import on appeal. This is not the case. Nonetheless, we will review Manighalam's assertions of error to the extent we are able, based on the parched record before us.

(2) Summary Judgment Review –

"Under summary judgment law, any party to an action, whether plaintiff or defendant, 'may move' the court 'for summary judgment' in his [or her] favor on a cause of action . . . or defense (Code Civ. Proc., § 437c, subd. (a)) — a plaintiff 'contend[ing] . . . that there is no defense to the action,' a defendant 'contend[ing] that the action has no merit' (*ibid.*). The court must 'grant[]' the 'motion' 'if all the papers submitted show' that 'there is no triable issue as to any material fact' (*id.*, § 437c, subd. (c)) — that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law [citations] — and that the 'moving party is entitled to a judgment as a matter of law' (Code Civ. Proc., § 437c, subd. (c))." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

"[I]n moving for summary judgment, a 'defendant . . . has met' his [or her] 'burden of showing that a cause of action has no merit if' he [or she] 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. . . .' (Code Civ. Proc., § 437c, subd. (*o*)(2).)"[6] (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 849.)

On review of a summary judgment, we "examine the record de novo and independently determine whether [the] decision is correct. [Citation.]" (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1149.)

(3) Third Amended Complaint –

In the third amended complaint, ASA stated: "Plaintiff, a small Internet Service Provider ('ISP') contracted with defendants to provide Digital Subscriber Line ('DSL') services to consumers." It alleged "that defendants violated Bus. & Prof Code Sections 16727, 17043 and 17200, et seq. by 1) engaging in the unlawful tying of services; 2) engaging in predatory pricing; and 3) by unfairly competing in the marketplace, all to the detriment of plaintiff."

The section 17043 cause of action, for predatory pricing, was resolved by demurrer, as we have already discussed. Only the causes of action based on sections 16727 and 17200 et seq. are at issue in the summary judgment review. However, in his briefing on appeal, Manighalam has failed to address the second cause of action, for violation of section 16727 based on tying of advertising services.[7] Consequently, he has

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6 See now Code of Civil Procedure section 437c, subdivision (p)(2).

7 For informational purposes, in framing the second cause of action, ASA, in the third amended complaint, stated: "ASA alleges that . . . defendants . . . would only provide marketing on their own website for customers . . . who purchased T3 lines.

abandoned his appeal as to the ruling on that cause of action. (*Tanner v. Tanner, supra,* 57 Cal.App.4th at p. 422, fn. 2.) We address, in turn, the first cause of action, based on section 16727 and the fourth cause of action, based on section 17200 et seq.

(4) First Cause of Action: Business and Professions Code Section 16727 –

Section 16727 provides: "It shall be unlawful for any person to lease or make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, or to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State."

(a) ASA's allegations

In its third amended complaint, ASA stated in support of its first cause of action: "ASA alleges that at all relevant times defendants . . . provided only 32 ATM circuits to ISPs who leased a T1 circuit, including plaintiff, and dedicated 255 circuits to ISPs who leased a faster and more expensive T3 connection. Plaintiff alleges that there is no technical reason for this distinction; defendants could just as easily assign 255 ATM circuits to both T1 and T3 connections. Plaintiff further alleges that most ISPs, including ASA, neither need nor want the additional speed of the T3. [¶] . . . ASA alleges that this

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Plaintiff alleges that there is no technical reason for doing so; defendants could just as easily provide website marketing for customers purchasing T1 lines. Plaintiff further alleges that most ISPs, including ASA, neither need nor want the additional speed of a T3." The court held that there was no triable issue of fact regarding the second cause of action. It stated, inter alia, that advertising is a service, so no cause of action lies under section 16727, which does not support a cause of action when the tying item is a service.

condition links the sale of the tying product to the tied product. Specifically, ASA is required by defendants' unlawful condition to lease a product it does not want — a T3 connection — in order to obtain a product it does require — additional ATM circuits."

(b) Pacific Bell's defense

In the three-page notice of motion and motion for summary judgment, Pacific Bell stated: "Plaintiff cannot establish that Defendants sold it any goods, merchandise, machinery, supplies, [or] commodities, an essential element of a cause of action under Business and Professions Code section 16727." Since we do not have Pacific Bell's memorandum of points and authorities in support of its motion, we do not know what legal authorities Pacific Bell cited therein.

However, Manighalam, without citation to the record, assures us that Pacific Bell, in making its motion, "relied heavily upon" *Morrison v. Viacom, Inc.* (1998) 66 Cal.App.4th 534. As that case states, "section 16727 does not apply when the tying item is a service. [Citation.]" (*Id.* at p. 546.) "The term 'services' [as contained in the statute] is used to describe tied items and is not used to described tying items." (*Ibid.*) *Morrison v. Viacom, Inc., supra,* 66 Cal.App.4th 534 evidently was raised at the trial level, because the court, in granting summary judgment, relied upon it at least in part.

In its order granting summary judgment, the court first stated that ASA proffered no evidence whatsoever in opposition to the motion. It said that ASA did nothing other than repeat its own allegations as contained in the third amended complaint, and that allegations do not constitute evidence in opposition to a motion for summary judgment.

Next, the court, citing *Morrison v. Viacom, Inc., supra,* 66 Cal.App.4th 534, stated that no cause of action lies under section 16727 when a service is the tying item. It then concluded that the undisputed facts showed that ASA purchased only DSL transport services from Pacific Bell, so that the first cause of action, based on section 16727, necessarily failed.

The court gave six reasons in support of its conclusion, including: "a. Plaintiff's Second Amended Complaint and Third Amended Complaint admit that ATM, T1, and T3 are services. [Citations.] [¶] . . . [¶] d. Internet Service Providers ('ISPs') such as Plaintiff package Defendants' DSL transport service with their own Internet access service for sale to consumers, but ISPs do not receive equipment, or access to Defendants' equipment, from Defendants. [Citations.] [¶] e. Defendants' tariffs, from which Plaintiff placed its orders, define the DSL transport offerings as a service. [Citations.] The terms of these tariffs become incorporated into any contract with a utility and have the force and effect of law. [Citations.] [¶] f. Decisions and orders of the California Public Utilities Commission ('CPUC') and the Federal Communications Commission ('FCC') define DSL transport as a service under state and federal law. [Citations.]"

In reviewing this order, we are somewhat hampered by the inadequacy of the record. What we have available to review is Pacific Bell's statement of undisputed facts and ASA's response thereto. As it turns out, this information is enough to show that the trial court was correct.

In its statement of undisputed facts, Pacific Bell quoted four portions of the third amended complaint wherein ASA characterized "T1" lines, "T3" lines, and/or ATM circuits as "services." In its response, ASA did not dispute it had so characterized them, although we happen to observe that ASA was inconsistent in its characterizations in its third amended complaint.

Pacific Bell also quoted two statements from CPUC schedules, five statements from CPUC orders and decisions, four statements from FCC tariffs, and twelve statements from FCC reports, orders, notices and opinions, all describing "T1" lines, “T3” lines, ATM circuits and/or DSL, as services of one nature or another. ASA did not dispute any of the statements.[8]

One of the quoted statements was from a CPUC schedule providing: “‘Pacific Bell’s FasTrak ATM Cell Relay Service is a fast packet service offering networking capabilities using an industry-recognized technology — Asynchronous Transfer Mode (ATM). With this high speed, connection-orientated transport service the Utility transmits information in fixed-size segments or cells . . . over various bandwidth capacities.’” It also cited two FCC tariffs and quoted statements therefrom that contained similar information, although they did not name Pacific Bell specifically.

Pacific Bell also cited a CPUC schedule which it characterized as providing that “[a] T1 circuit is simply a service provided over a wire: ‘a high performance service providing transmission of 1.544 [T1 or DS1], 3.152, 6.312, 44.736 (DS3, DS3x3, or DS3x12) or 274.176 Mbps . . . . with either an electrical or fiber optic [interface].’”

Furthermore, Pacific Bell quoted an FCC tariff explaining: “‘Wholesale Digital Subscriber Line (DSL) Transport Service is a virtual session between Company’s ATM network and Customer’s designated End User premises utilizing asymmetrical DSL technology over a DSL Line. A DSL Line is the physical facility between the Company’s DSLAM . . . and the Network Interface Device (NID) located at the End User premises. Company retains ownership of the overall DSL Line. Company may place special equipment within its DSL Transport and ATM network, to allow for the provisioning and management of multiple applications on each DSL Line. Wholesale DSL Transport Service is intended primarily for Internet Service Provides (ISPs), but

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8 While not disputing any of the statements, ASA did object to the relevancy of some of them. The evidentiary objections were overruled, and Manighalam does not challenge the evidentiary ruling on appeal.

may be purchased by any information Service provider or carrier to connect to their End User for the purposes of providing a retail Service.'"

In addition to this FCC tariff addressing ownership of the DSL line, Pacific Bell, in its statement of undisputed fact, cited the declarations of three of its managers who provided explanations concerning such things as ownership of the lines in question. For example, it cited the declaration of Drew Armbruster, product manager of DSL transport for SBC Services, Inc., who said: "Various types of equipment are used by Defendants in order to provide DSL transport service to ISP customers. However, the equipment remains the property of Defendants . . . ."[9]

Reviewing Pacific Bell's statement of undisputed facts, including the aforementioned statements and many others, it is clear that Pacific Bell proffered an abundance of evidence to show that the CPUC and the FCC characterize DSL service, "T1" and "T3" lines, and ATM circuits as part and parcel of a service. Some of the evidence was in the form of tariffs, the significance of which the trial court properly noted.

"The PUC has been vested by the Legislature with broad supervisory and regulatory powers. [Citation.] Pac Bell as a public utility is subject to applicable provisions of the Public Utilities Code. [Citations.] It is required to file tariffs with the PUC covering the terms and conditions, including rates, classifications and attendant liabilities, under which it renders service. [Citation.] 'A public utility's tariffs filed with the PUC have the force and effect of law.' [Citations.]" (*Colich & Sons v. Pacific Bell* (1988) 198 Cal.App.3d 1225, 1232, fns. omitted.)

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9 Although ASA objected to the declarations, its objections were overruled in the order granting summary judgment. On appeal, Manighalam does not challenge the order overruling ASA's objections. Moreover, he concedes the one point we note from the declaration of Drew Armbruster, concerning control over the equipment.

Pacific Bell met its burden to show that ASA could not establish an element of the first cause of action for violation of section 16727, inasmuch as, under that statute, the tying item cannot be a service and Pacific Bell put on evidence to show that only services were at issue.

(c) ASA's burden

The burden shifted to ASA to raise a triable issue of material fact with respect to the first cause of action or a defense thereto. However, ASA did not dispute the statements from the CPUC and FCC schedules, tariffs, reports, opinions, decisions and orders, except with respect to certain relevancy objections that were overruled, as previously noted. Moreover, ASA proffered no contrary evidence. ASA did not meet its burden. The trial court was correct that the first cause of action failed.

(d) Manighalam's arguments on appeal

Manighalam disagrees. He claims that the court decided whether ATM circuits and DSL Internet access are products or services as a matter of law, and erred in doing so. He insists that the issue of whether ATM circuits and DSL Internet access are products or services is a question of fact, which cannot be resolved on summary judgment.

Manighalam misapprehends both the court's orders and the nature of summary judgment proceedings. In the order granting summary judgment, the court cited *Morrison v. Viacom, Inc., supra,* 66 Cal.App.4th 534 for the proposition that section 16727 does not support a cause of action based on a service as the alleged tying item. It did not hold that, based on that case or any other, ATM circuits and DSL Internet access are services as a matter of law. Rather, in the order overruling the demurrer as to the first cause of action, the court stated that the question of whether products or services were at issue required a consideration of fact. Later, in the order granting summary judgment, the court clearly addressed the question as one of fact, and stated that there was no triable issue of material fact as to the first cause of action, because the undisputed facts established that ASA purchased only services.

Manighalam has cited no portion of the record to show that was error. Rather, the record provided demonstrates that Pacific Bell proffered evidence that ASA did not dispute and ASA proffered no contrary evidence. The court treated the question as one of fact and ASA failed to meet its burden to raise a triable issue of material fact.

(5) Fourth Cause of Action: Business and Professions Code Section 17200 et seq. –

The unfair competition law, set forth in section 17200 et seq., "does not proscribe specific practices. Rather, . . . it defines 'unfair competition' to include 'any unlawful, unfair or fraudulent business act or practice.' [Citation.] Its coverage is 'sweeping, embracing "'anything that can properly be called a business practice and that at the same time is forbidden by law.'"' [Citations.]" (*Cel-Tech, supra,* 20 Cal.4th at p. 180, fn. omitted.) "The statutory language referring to 'any unlawful, unfair *or* fraudulent' practice . . . makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law." (*Ibid.*)

(a) ASA's allegations

With respect to the fourth cause of action, the third amended complaint stated: "ASA alleges that defendants fill the orders of their PacNet subsidiary faster than the orders of competing ISPs, including plaintiff, coerces ISPs to lease an expensive T3 connection they neither want [n]or require in order to obtain the ATM ports they do need, and give away modems and ISP service to customers, even though defendants incur a loss to do so." ASA further alleged: "The acts and practices of defendants . . . constitute unlawful, unfair, or fraudulent business practices in violation of California Business and Professions Code Sections 17200, *et seq*. Defendants' conduct involves and threatens an incipient violation of California antitrust law, including the above-specified provisions of the Cartwright Act, or otherwise violates the policy or spirit of one of those laws because its effects are comparable to or the same as violations of the law, or otherwise significantly harms or threatens competition." ASA requested general damages, treble damages, special damages, and "restitution or unjust enrichment."

(b) Pacific Bell's defense

In the notice of motion and motion for summary judgment, Pacific Bell stated: "Plaintiff cannot establish that Defendants committed any unfair business practice, an essential element of a cause of action under Business and Professions Code section 17200." Once again, because the record on appeal does not contain a copy of Pacific Bell's memorandum of points and authorities in support of the motion for summary judgment, we do not know what legal authorities Pacific Bell cited with respect to its arguments on section 17200 et seq. We could end our discussion of the fourth cause of action right here, and hold that Manighalam cannot meet his burden to show error because he has not provided an adequate record for review. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund, supra,* 65 Cal.App.4th at p. 1433.) However, we will continue the discussion with what little information we have in the record.

The statement of undisputed fact was directed to only two matters. The first, as we already know, was whether ASA purchased products or services. The second was the nature of Pacific Bell's advertising program. The statement of undisputed fact, then, was geared toward the determination of the viability of the first and second causes of action under section 16727. Because the statement of undisputed fact pertained only to those two matters, we assume that Pacific Bell made only legal arguments with respect to the section 17200 issues. Whether the legal arguments it made before the trial court were the same as it makes on appeal, we do not know.

In the order granting summary judgment, the court observed that ASA's alleged Cartwright Act violations had failed. Perhaps because the Cartwright Act was the only body of law ASA cited in its third amended complaint in support of its unfair competition claim, and the Cartwright Act claims had failed, the trial court held that Pacific Bell had met its burden to show that one or more elements of the fourth cause of action could not be established or that there was a complete defense thereto, and further that ASA had "failed to plead or present any evidence of an injury to competition from restraints on competition, any statutory violation, or any public policy violation tethered to a specific statute . . . ." Consequently, it held that there were no triable issues of material fact with respect to the fourth cause of action.

The trial court relied upon *Cel-Tech, supra,* 20 Cal.4th 163 in rejecting ASA's arguments. As the *Cel-Tech* court stated, in determining whether a plaintiff has stated a cause of action under the unfair competition law, "any finding of unfairness to competitors under section 17200 [must] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." (*Id.* at pp. 186-187.) "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Id.* at p. 187, fn. omitted.)

As we read the third amended complaint, we too see that ASA alleged no incipient violation of an antitrust law other than the Cartwright Act. Since, as we have already held, the Cartwright Act provision in question, section 16727, does not apply when the alleged tying item is a service, there was no violation, and consequently, no incipient violation, of the Cartwright Act.

There is a separate question as to whether the alleged facts could violate the policy or spirit of the Cartwright Act, without violating the Cartwright Act itself. Again, what arguments the parties made in their papers in support of and in opposition to the motion for summary judgment, we do not know. We are not persuaded by Pacific Bell's assertion on appeal that when a plaintiff fails to state a cause of action under the Cartwright Act any derivative claim he or she may assert under the unfair competition law must necessarily fail. Pacific Bell reads too much into its cited authority.

The Supreme Court in *Cel-Tech, supra,* 20 Cal.4th 163 concluded that even if the defendant's actions did not violate the Unfair Practices Act, they might nonetheless violate the unfair competition law. (*Id.* at p. 169.) It expressly stated that "a practice may be deemed unfair [under the unfair competition law] even if not specifically proscribed by some other law." (*Id.* at p. 180.) The case thus left room for an argument that an allegation that was insufficient to state a cause of action under the Cartwright Act might, in a given case, still state a cause of action under the unfair competition law.

The *Cel-Tech* court explained: "'[I]t would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited [citations], since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery.' [Citation.]" (*Cel-Tech, supra,* 20 Cal.4th at p. 181, fn. omitted.) True enough, the court also stated that "[a] plaintiff may . . . not 'plead around' an 'absolute bar to relief' simply 'by recasting the cause of action as one for unfair competition.' [Citation.]" (*Id.* at p. 182.) At the same time, it further explained: "The rule does not, however, prohibit an action under the unfair competition law merely because some other statute on the subject does not, itself, provide for the action or prohibit the challenged conduct. To forestall an action under the unfair competition law, another provision must actually 'bar' the action or clearly permit the conduct. There is a difference between (1) not making an activity unlawful, and (2) making that activity lawful." (*Id.* at pp. 182-183.) Here, section 16727 does not make the tying of services unlawful under the Cartwright Act, yet it also does not make such tying lawful.

Whether or not it would theoretically be possible to state a cause of action under the unfair competition law based on the alleged conduct of Pacific Bell, we are persuaded by Pacific Bell's argument that the cause of action as framed is defective because the unfair competition law does not make available any remedy ASA sought in the third amended complaint. As we recall, ASA requested general and special damages, treble damages, restitution and "unjust enrichment." As Pacific Bell points out in its respondent's brief, those remedies are not available under the unfair competition law.

Under the unfair competition law, "[p]revailing plaintiffs are generally limited to injunctive relief and restitution. [Citations.] Plaintiffs may not receive damages, much less *treble* damages, or attorney fees. [Citations.]" (*Cel-Tech, supra,* 20 Cal.4th at p. 179.) As Pacific Bell points out, ASA, in its third amended complaint, sought restitution, but alleged no basis for the remedy. Indeed, ASA alleged in its third amended complaint that it did not obtain the additional ATM circuits it desired "because it could not justify the cost of a T3 cable." In other words, it did not expend monies on a T3 cable that it sought to have restored to it through restitution.

In his reply brief, Manighalam states: "Restitution of money [Pacific Bell] obtained that, had it not been for [Pacific Bell's] unfair competition, would have been received by ASA is an available remedy." Not surprisingly, he cites no legal authority in support of this proposition. The Supreme Court has rejected such an allegation as the basis for restitution under the unfair claims act, in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134 (*Korea Supply*).

The *Korea Supply* court "defined an order for 'restitution' as one 'compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person.' [Citation.]" (*Korea Supply, supra,* 29 Cal.4th at pp. 1144-1145.) It held that the remedy the plaintiff therein sought was "not restitutionary because plaintiff [did] not have an ownership interest in the money it [sought] to recover from defendants," explaining that the plaintiff was "not seeking the return of money or property that was once in its possession." (*Id.* at p. 1149.) The court concluded that "disgorgement of profits allegedly obtained by means of an unfair business practice [was not] an authorized remedy under the UCL where these profits [were] neither money taken from a plaintiff nor funds in which the plaintiff [had] an ownership interest." (*Id.* at p. 1140.)

Likewise, in the case before us, Manighalam does not seek the return of funds ASA paid to Pacific Bell, or even funds in which ASA had an interest. Rather, "plaintiff relies on general principles of the law of remedies, e.g., that restitution in the broad sense focuses on the defendant's unjust enrichment, rather than the plaintiff's loss. Plaintiff's generalization fails to acknowledge the specific limitation applicable in the UCL context—that restitution means the return of money to those persons from whom it was taken or who had an ownership interest in it. [Citation.] Although this restitution serves to thwart the wrongdoer's unjust enrichment, courts ordering restitution under the UCL 'are not concerned with restoring the violator to the status quo ante. The focus instead is on the victim.' [Citation.] The object is to return to the plaintiff funds in which he or she has an ownership interest. [Citation.] Thus, plaintiff's assertion that defendants received ill-gotten gain does not make a viable UCL claim unless the gain was money in which plaintiff had a vested interest." (*Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 455.)

As noted above, restitution is not the only remedy available under the unfair competition law; injunctive relief is also available. (Bus. & Prof. Code, § 17203.) As Pacific Bell points out, however, ASA did not request injunctive relief in its third amended complaint. In response, Manighalam states in his reply brief: "ASA's complaint is sufficiently broad to encompass injunctive relief precluding [Pacific Bell] from continuing its specific unfair practices (limitations on ATM circuits, giveaway modems, preferential connection times, etc) or other unfair practices that are proved at time of trial." Whether or not the allegations would have supported a request for injunctive relief had such relief been requested, it remains the case that ASA did not in fact request injunctive relief in its third amended complaint. Since ASA sought only damages, including a damages request disguised as a request for restitution, and damages are unavailable under the unfair competition law, ASA's claim failed as a matter of law.

III

DISPOSITION

The judgment is affirmed. Pacific Bell and SBC shall recover their costs on appeal.

MOORE, J.

WE CONCUR:

SILLS, P. J.

IKOLA, J.